IN THE
SUPREME COURT OF THE STATE OF MICHIGAN

On Appeal From The Michigan Court Of Appeals
Jansen, P.J. and Neff and Kelly, J.J.

LULA ELEZOVIC,
Plaintiff-Appellant,

vs.

FORD MOTOR COMPANY, and
DANIEL P. BENNETT, jointly and severally,
Defendants-Appellees.

Supreme Court No. 125166

Court of Appeals No. 236749

Wayne County Circuit Court
No. 99-934515-NO
The Honorable Kathleen MacDonald

BRIEF ON APPEAL - APPELLEES
PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

Defendants-Appellees Ford Motor Company and Daniel P. Bennett agree that this Court has jurisdiction pursuant to MCL 600.215(3); MSA 27A.215(3), based on Plaintiff's timely filing of an Application for Leave, which the Court granted by Order dated July 8, 2004. (Apx. 345a). See also, MCR 7.301(A)(2), MCR 7.302(G)(3).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT A SUPERVISOR ENGAGING IN ACTIVITY PROHIBITED BY THE MICHIGAN ELLIOTT-LARSEN CIVIL RIGHTS ACT MAY NOT BE HELD INDIVIDUALLY LIABLE FOR VIOLATING A PLAINTIFF'S CIVIL RIGHTS?

Answer of the Court of Appeals: "Yes"
Answer of the Circuit Court: Did not answer
Defendants-Appellees' Answer: "Yes"

II. WHETHER THE TRIAL COURT PROPERLY ACTED WITHIN ITS DISCRETION IN EXCLUDING *IN LIMINE* A MISDEMEANOR CONVICTION FOR OFF-PREMISES CONDUCT INVOLVING STRANGERS PURSUANT TO MRE 404 AND MRE 403, WHERE THE CONVICTION WAS NOT NOTICE OF A SEXUALLY HOSTILE WORK ENVIRONMENT, AND ITS POTENTIAL FOR UNDUE PREJUDICE SUBSTANTIALLY OUTWEIGHED ANY MARGINAL RELATIONSHIP TO PLAINTIFF'S CASE?

Answer of the Court of Appeals: "Yes"
Answer of the Circuit Court: "Yes"
Defendants-Appellees' Answer: "Yes"

III. WHETHER THE TRIAL COURT PROPERLY ACTED WITHIN ITS DISCRETION IN EXCLUDING *IN LIMINE* A MISDEMEANOR CONVICTION FOR OFF-PREMISES CONDUCT INVOLVING STRANGERS PURSUANT TO MRE 404 AND 403, WHERE THE CONVICTION LACKED THE REQUISITE LEVEL OF SIMILARITY TO PLAINTIFF'S CLAIM AND WHERE ITS POTENTIAL FOR PREJUDICE SUBSTANTIALLY OUTWEIGHED ANY MARGINAL RELATIONSHIP TO PLAINTIFF'S CASE?

Answer of the Court of Appeals: "Yes"
Answer of the Circuit Court: "Yes"
Defendants-Appellees' Answer: "Yes"

IV. WHETHER THE TRIAL COURT PROPERLY GRANTED A DIRECTED VERDICT ON PLAINTIFF'S HOSTILE ENVIRONMENT CLAIM AGAINST FORD WHERE PLAINTIFF'S "NOTICE" TO FORD OF AN ALLEGED SEXUALLY HOSTILE ENVIRONMENT CONSISTED SOLELY OF AN ALLEGED REPORT TO FIRST-LINE SUPERVISION THAT PLAINTIFF CONDITIONED ON CONFIDENTIALITY AND NON-SEXUAL COMPLAINTS ABOUT THE ALLEGED HARASSER?

Answer of the Court of Appeals: "Yes"
Answer of the Circuit Court: "Yes"
Defendants-Appellees' Answer: "Yes"

V. WHETHER THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN EXCLUDING FROM EVIDENCE UNPROVEN SEXUAL HARASSMENT ALLEGATIONS THAT WERE UNRELATED TO PLAINTIFF OR PLAINTIFF'S WORK ENVIRONMENT?

Answer of the Court of Appeals: "Yes"
Answer of the Circuit Court: "Yes"
Defendants-Appellees' Answer: "Yes"

I. COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Following a three-week trial in August 2001, Wayne County Circuit Court Judge Kathleen MacDonald directed a verdict in favor of Defendants-Appellees Ford Motor Company and Daniel P. Bennett ("Ford" and "Mr. Bennett" respectively, or "Defendants" collectively) on a variety of claims under the Elliott-Larsen Civil Rights Act ("Elliott-Larsen"), brought by Plaintiff-Appellant Lula Elezovic ("Plaintiff"). Those claims involved alleged workplace sexual harassment, gender discrimination, and retaliation by Mr. Bennett, a Superintendent at Ford's Wixom Assembly Plant (the "Wixom Plant"). In her appeal to the Court of Appeals, Plaintiff challenged the directed verdict as to the sexual harassment and gender claims.[1] Plaintiff also challenged several of the trial court's evidentiary rulings, most notably the trial court's exclusion *in limine* of Mr. Bennett's 1995 conviction for misdemeanor indecent exposure, a conviction that involved off-premises, off-duty conduct with individuals unknown to both Defendants. The convicting court entered an order expunging Mr. Bennett's misdemeanor conviction in November 2001.

In a published opinion dated October 23, 2003, the Court of Appeals (Jansen, P.J., and Neff and Kelly, JJ.) affirmed the trial court in all respects. Elezovic v Ford Motor Company, 259 Mich App 187; 673 NW2d 776 (2003). However, in affirming the trial court with respect to Plaintiff's sexual harassment claim against Mr. Bennett, the majority stated its disagreement with another Court of Appeals decision, Jager v Nationwide Truck Brokers Inc, 252 Mich App 464; 652 NW2d 503 (2002) lv den, 468

[1] Plaintiff did not appeal from the directed verdict on her retaliation claim. Defendants therefore omit a recitation of facts post-dating Plaintiff's filing of her Complaint on November 1, 1999, as those facts were not material in the Court of Appeals and are not material here. For the same reason, Defendants do not address the issue of whether individual liability can exist under Elliott-Larsen's anti-retaliation provision.

Mich 884; 661 NW2d 232 (2003), and reconsideration den, 468 Mich 884; 666 NW2d 668 (2003). The Court of Appeals ruled in Jager that a supervisor cannot be held individually liable for violations of Elliott-Larson's anti-discrimination and anti-harassment provisions. The Court of Appeals declined to convene a "conflicts" panel under MCR 7.215(J) concerning this issue. Elezovic v Ford Motor Company, 259 Mich App 801; 677 NW2d 378 (2003).

By Order dated July 8, 2004, this Court granted Plaintiff's Application for Leave to Appeal. Elezovic v Ford Motor Company, 470 Mich 892; 683 NW2d 144 (2004). In so doing, the Court directed the parties "to include among the issues briefed whether a supervisor engaging in activity prohibited by the Michigan Civil Rights Act, MCL § 37.2101 *et seq.*, may be held individually liable for violating a plaintiff's civil rights." Id.

In her Brief to this Court, Plaintiff addresses the individual liability issue, and also challenges the trial court's exercise of its discretion in excluding Mr. Bennett's now-expunged misdemeanor conviction for non-workplace misconduct involving strangers (which Plaintiff claims was notice to Ford that Mr. Bennett was sexually harassing her). Plaintiff next claims that, even without the conviction, she presented sufficient evidence of notice to withstand a directed verdict. Plaintiff finally contends the trial court abused its discretion in excluding assorted and unproven internal complaints by other employees, which were unrelated to Plaintiff or her work environment.

As the Court of Appeals correctly determined in Jager, and re-affirmed in Elezovic, Elliott-Larsen does not impose individual liability on supervisors accused of creating a sexually hostile work environment. Plaintiff's arguments to the contrary are erroneous. The definitional language of Elliott-Larsen, like the substantially similar language of the parallel federal statute, is not "clear and unambiguous" so as to be

capable of a single interpretation.

With respect to the directed verdict and evidentiary issues, Plaintiff represents to this Court that there was an "extraordinary divergence in testimony" in this case (Plaintiff's Brief, p 1), implying that the trial court made credibility determinations in contravention of the directed verdict standard. That is not so. While there were immaterial conflicts in the testimony, as there will be in any trial, there was no conflicting testimony on the facts material to the trial court's directed verdict. Rather than making credibility determinations, the trial court properly focused on whether Plaintiff had presented evidence on those elements on which she bore the burden of proof. It was this failure of proof -- not credibility determinations -- that necessitated a directed verdict in Defendants' favor.

In addition, Plaintiff's lurid recitation of the "facts" from her perspective underscores the propriety of those trial court evidentiary rulings challenged by Plaintiff here. The only facts pertinent to the issues raised here are those relevant to the question of Ford's *respondeat superior* liability for an alleged sexually hostile environment directed at Plaintiff. Those uncontested facts -- concerning Ford's complaint procedures and Plaintiff's refusal to use those procedures to report alleged sexual harassment -- are set forth below.

A. Plaintiff's Hourly Employment At Ford's Wixom Plant: 1988.

Plaintiff started her hourly employment at the Wixom Plant in March 1988. (Apx. 54b, 212b). From the beginning, the shift to which she was assigned was a paramount issue for her. Plaintiff's shift assignment -- and her repeated grievances and labor relations complaints over it -- were a source of long-term controversy with both the union and management. (Apx. 63b-66b, 72b-73b, 80b-88b, 195b-206b, 213b-221b).

Plaintiff's shift assignment, as well as overtime and other terms and conditions of employment, were governed by the collective bargaining agreement between Ford and the UAW. (Apx. 187b-191b). The collective bargaining agreement subjected Plaintiff, like her co-workers, to two "bump seasons" a year, at which time hourly employees were allowed to exercise shift preferences based on each employee's plant seniority. (Apx. 76b-78b). Plaintiff was at all times aware of these contractual provisions. (Id).

B. Plaintiff Complains About Her UAW Committeeman To Obtain Her Preferred Shift Assignment: 1990 - 1991.

In connection with her shift assignment, Plaintiff quickly became familiar with the grievance and complaint mechanisms available to her. Plaintiff did not hesitate to invoke these procedures, including for the purpose of filing sexual harassment allegations. Specifically, in 1990 Plaintiff filed a series of non-sexual complaints concerning her UAW committeeman, Bill McKeever, in an ultimately successful attempt to maintain her preferred day shift status. (Apx. 257b-260b)

In October 1991, however, when it appeared that her earlier complaints against Mr. McKeever were not going to protect her from an upcoming "bump," Plaintiff renewed her complaints. (Apx. 65b). She complained to Wixom Plant Labor Relations that a UAW local official, Larry Miller, had promised her she could always stay on the day shift. When it was explained to her that the contract and her seniority controlled her shift assignment, Plaintiff put her claim in writing. (Apx. 72b-73b, 80b, 213b, 215b-216b). When Labor Relations reiterated it could not deviate from seniority, Plaintiff told Labor Relations she was afraid of Mr. McKeever and would have to bring a gun to work. When she still failed to obtain the desired result, Plaintiff submitted a second written complaint, this one falsely claiming that Mr. McKeever had been sexually harassing her. (Apx. 72b-75b, 80b, 214b, 217b-220b). Plaintiff acknowledged at trial that the sexual

harassment complaint was untrue and admitted that Mr. McKeever never sexually harassed her. (Apx. 55b, 56b).[2] Plaintiff nevertheless got her wish and returned to the day shift. (Apx. 65b, 72b-73b, 109b-114b, 221b).

C. Plaintiff Complains About Mr. Bennett To Obtain Her Preferred Shift: 1997.

After 1991, so long as Plaintiff remained on the day shift, she filed no labor relations complaints or grievances.[3] It was not until April 1997, when Plaintiff learned she was about to be bumped again, that she resumed filing complaints, just as she had in 1990 and 1991. By this time, Mr. Bennett was the Superintendent for Plaintiff's department. (Apx. 88b). Upon learning she was to be bumped off the day shift, Plaintiff tried to avoid the bump by presenting "work restrictions" to Mr. Bennett and claiming these restrictions precluded her from working the night shift. Because Plaintiff was being bumped to the same job on the night shift that she had been doing on the day shift, Mr. Bennett told Plaintiff she was abusing the system to avoid the bump, and sent her to the Wixom Plant hospital to have her restrictions reviewed. On April 18, 1997, Plaintiff filed a grievance accusing Mr. Bennett of being "unfair." (Apx. 102a-103a, 92b-93b, 222b-225b). Four days later, Plaintiff filed another grievance claiming "temporary" workers were being given preferential shift assignments and demanding to be returned to the day shift. (Apx. 226b-229b).

A week later, on April 29, 1997, Plaintiff filed yet another grievance, claiming she had been denied equalized overtime. (Apx. 108a-109a, 230b-233b). Although Plaintiff

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[2] While Plaintiff attempted to deny under oath knowing anything about the October 1991 complaint she submitted accusing Mr. McKeever of sexual harassment, she ultimately conceded that she filed the false accusation. (Apx. 145b-160b).

[3] Plaintiff was bumped off days for one week in 1995, but she was able to change that by complaining to her new UAW Committeeman, Brock Roy. (Apx. 87b).

had no proof she received less overtime than anyone else in her overtime group, nor did she know who might be responsible if she had been shorted on overtime, Plaintiff blamed Mr. Bennett. (Id; 89b-91b). Shortly thereafter, on June 12, 1997, Plaintiff filed another complaint, this one accusing Mr. Bennett of having tried to recruit Plaintiff two years earlier, in 1995, to conspire with an hourly co-worker to make false accusations against a superintendent, purportedly so Mr. Bennett could get a promotion. (Apx. 102b-106b, 234b-235b).

As a result of this series of grievances, and with assistance from the union, Plaintiff succeeded in getting back on the day shift within a matter of weeks. (Apx. 94b-95b).

D. Plaintiff Accuses Co-Worker Tami Holcomb Of Threatening Her To Obtain Her Preferred Shift: 1998.

When the next bump season rolled around in April 1998, the union had made clear there would be no "special deals" on shift preferences, so Plaintiff knew she would no longer get help from the union. When the bump came and Plaintiff lost her preferred shift, Plaintiff accused a female co-worker, Tami Holcomb, of threatening her life, and then took a medical leave until approximately July 1998. (Apx. 328a, 96b-97b).

Following Plaintiff's return from leave, and as the next bump season approached in October 1998, Plaintiff lodged repeated complaints about Ms. Holcomb. For example, in a letter dated July 23, 1998, Plaintiff's therapist Dr. Fran Parker wrote: "There continues to be a problem with [Plaintiff] working with Tammy [sic] Holcomb on the same shift" and Ms. Holcomb "continues to harass [Plaintiff]." (Apx. 182b-183b, 236b). Similarly, by letter dated August 10, 1998, Dr. Parker advised Ford that she considered Ms. Holcomb's continued interactions with Plaintiff to be a "potentially lethal situation." (Apx. 177b-181b, 237b-241b). All in all, Plaintiff's complaints about Ms.

Holcomb spanned an eight-month period, from April 1998 through December 1998.

Plaintiff's complaints about Ms. Holcomb sometimes also mentioned Mr. Bennett, claiming Mr. Bennett was friends -- and therefore in collusion -- with Ms. Holcomb. For instance, in one of three "progress notes" Dr. Parker attached to her August 10, 1998 letter, Dr. Parker wrote:

> [Plaintiff] continues to have to work in close proximity to Tammy [sic] Holcomb who intentionally comes around her. Dan Bennett is on days and comes around her and stares at her and then walks away. He is also making her uncomfortable because of his liaison with Tammy.

(Apx. 240b).

Dr. Parker again complained about Ms. Holcomb on August 21, 1998, based on a claim by Plaintiff that Ms. Holcomb had again "harassed" Plaintiff on August 20, 1998. (Apx. 242b). On August 25, 1998, Labor Relations tried to question Plaintiff on what had happened. Plaintiff started crying and shaking and said she was too upset to talk about it, but would write something down at home and bring it in the next day. Plaintiff also mentioned that Ms. Holcomb and Mr. Bennett were "looking at [Plaintiff] earlier today, laughing together," and that Plaintiff "felt they were making fun of her." (Apx. 244b). Management moved Ms. Holcomb to a different work area on or about August 26, 1998. (Apx. 244b). When Labor Relations tried to follow up with Plaintiff on August 27, 1998, Plaintiff refused to provide a statement. In fact, Plaintiff never submitted the promised statement. (Apx. 245b).

Beginning on September 28, 1998 and continuing through October 6, 1998 Plaintiff again started complaining about Ms. Holcomb and Mr. Bennett, i.e., that Mr. Bennett gave Plaintiff a "long mean look" when Plaintiff was late returning from a break; that Mr. Bennett "harassed" Plaintiff by changing her work assignment, and that Ms.

Holcomb was stalking Plaintiff. Ms. Holcomb, in turn, filed a complaint that Plaintiff was stalking and harassing Ms. Holcomb. (Apx. 57b-60b, 246b-254b).[4]

During the October 1998 bump season, Plaintiff also made statements about killing Mr. Bennett -- similar to threats she had made against Mr. McKeever in 1990 and 1991. Plaintiff then went on medical leave. (Apx. 97b-98b). Upon Plaintiff's return from leave, her therapist Dr. Parker again wrote to Labor Relations that Plaintiff's problems were related to what Plaintiff believed to be collusion between Ms. Holcomb and Mr. Bennett. By the next bump season in April 1999, Plaintiff had retained counsel. (Apx. 100b-101b). Nevertheless, Plaintiff still did not disclose to Ford a single allegation relating to sexual harassment until she filed the lawsuit in November 1999.

E. Plaintiff Admitted At Trial That She Never Complained To Ford About Alleged Sexual Harassment By Mr. Bennett.

Plaintiff admitted at trial that, despite her obvious comfort using the internal complaint procedures (including procedures for lodging sexual harassment complaints), and despite her many complaints to Labor Relations about Mr. Bennett, she never once complained that Mr. Bennett was subjecting her to sexual harassment in any way, shape or form. (Apx. 115b-116b). As the trial court correctly ruled, and the Court of Appeals properly affirmed, that admitted failure barred her hostile environment claim.

II. ARGUMENT

A. The Court of Appeals Correctly Decided The Individual Liability Issue.

In Jager, the Court of Appeals reviewed Elliott-Larsen's provision defining

[4] Although Plaintiff testified at trial that Mr. Bennett made a suggestive gesture toward her on one of these later occasions, her contemporaneous complaint to Labor Relations included no such allegation. (Id).

"employer" as including "agents" of an employer. The Court of Appeals considered the fact that this Court had already reviewed this definitional reference to "agents" and had concluded it refers to an employer's vicarious liability for discrimination or harassment. Chambers v Trettco Inc, 463 Mich 297, 310; 614 NW2d 910 (2000). Not surprisingly, the Court of Appeals in Jager adopted the rule articulated in Chambers, which rule is also followed by every federal circuit that has considered parallel language in the federal statute. The Court of Appeals concluded in Jager that the statutory provision identified the reach of the employer's vicarious liability for alleged harassment by the employer's agents, and was not intended to impose individual liability for violations of Elliott-Larsen. Jager was correctly decided. Its reasoning and outcome should be adopted by this Court.

1. Elliott-Larsen's Definition Of "Employer" Is Properly Construed To Create Vicarious Liability - Not Individual Liability.

In her brief, Plaintiff vacillates between asking this Court to ignore legislative intent entirely (because the statutory language is "unambiguous") and interpret Elliott-Larsen in light of legislative intent (particularly with respect to the statute's "obvious anti-sexual harassment policy") and "legislative scheme." (Plaintiff's Brief, pp 15, 17). The schizophrenia of Plaintiff's argument demonstrates its fallacy. The statutory language is not capable of only one interpretation -- though it is far more suggestive of one interpretation than any other. That interpretation was identified by this Court in Chambers and by the Court of Appeals in Jager, as well as the federal circuits that have reviewed essentially identical language in the earlier enacted federal statute, Title VII of the Civil Rights Act of 1964.

The definition set forth in MCL 37.2201(a); MSA 3.548(201)(a) provides that

"'Employer' means a person who has 1 or more employees, and includes an agent of that person." MCL 37.2201(a); MSA 3.548(201)(a).[5] This definition applies only to Article 2 of Elliott-Larsen. MCL 37.2201; MSA 3.548(201). Article 2, in turn, sets forth those actions an "employer" is prohibited from taking, specifically

> An employer shall not . . .
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including, but not limited to, a benefit plan or system.

MCL 37.2202(1)(a)-(c); MSA 3.548(202)(1)(a)-(c). Elliott-Larsen also provides that "discrimination because of sex includes sexual harassment." MCL 37.2103(i); MSA 3.548(103)(i).

Elliott-Larsen's definition of "employer" does not state that "agents" will be individually liable, although the Michigan Legislature could have used such plain language if that was intended, as it has done in other instances. See eg MCL 691.1407; MSA 3.996(107) (identifying when government employees will and will not be

[5] This provision, as originally passed, defined "employer" to mean "a person who has 4 or more employees, and includes an agent of that person." MCLA 37.2201, Historical and Statutory Notes (indicating subdivision (a) was amended in 1980 to "substitute[ ] '1' for '4'").

immune from individual liability). See also Meagher v Wayne State University, 222 Mich App 700, 728; 565 NW2d 401 (1997) ("The mere fact that MCL 37.2201(a); MSA 3.548(201)(1) defines "employer" as including an agent does not automatically authorize a claim against an agent"), lv den, 457 Mich 874; 586 NW2d 919 (1998). In fact, while interpreting Elliott-Larsen's definition of sexual harassment, in Chambers, this Court held that the statute's definition of "employer" "expressly addresses an employer's vicarious liability for sexual harassment committed by its employees." 463 Mich at 310. The Court further emphasized that it is the employer, not an agent, on whom liability will be imposed, concluding that, "under Michigan law, whether analyzing quid pro quo harassment or hostile environment harassment, the question is always whether it can fairly be said that the employer committed the violation -- either directly or through an agent." Id, 463 Mich at 312 (emphasis added).

2. Elliott-Larsen's Definition Of Employer Does Not "Clearly" Impose Individual Liability.

Even through the Michigan Legislature did not expressly impose individual liability under Elliott-Larsen, and despite this Court's interpretation in Chambers, Plaintiff argues that Elliott-Larsen's definition of "employer," by its "clear language," imposes individual liability. Plaintiff's contention is wrong.

The statutory language at issue can be read at least two ways. First, it can be read as ensuring that an employer does not escape liability by arguing that it was not the employing entity that discriminated -- its agent was. Read in this manner, because the agent who discriminates equates with the "employer," the employer will be held vicariously liable. The other possible interpretation is the one advanced by Plaintiff, i.e., that both the employer and the agent may be held directly liable.

Because the statutory language at issue could theoretically support either

interpretation, this is a case of ambiguity to which "clear language" arguments do not apply. As the U.S. Court of Appeals for the Seventh Circuit held with respect to Title VII's parallel language:

> We considered and rejected the "plain language" argument . . . as have most appellate courts which have directly considered the question. Moreover, we have previously recognized that the statutory language at issue is ambiguous, susceptible of several possible meanings.

Williams v Banning, 72 F3d 552, 554 (CA 7, 1995). Elliott-Larsen's definition is virtually identical to Title VII's, which defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." 42 USC 2000e(b). Title VII also does not define the term "agent."[6]

All eleven federal circuits that have considered the question are in agreement with the holding of Chambers and Jager that the definition calls for the first interpretation, i.e., that it defines the employer's vicarious liability, not the individual liability of an employee or other putative agent.[7]

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[6] The pertinent language of 42 USC 2000e(b) has remained unchanged since Title VII was enacted in 1964 (except for the fact that the provision originally set the minimum number of employees at 25).

[7] See Indest v Freeman Decorating Inc, 164 F3d 258, 262 (CA 5, 1999); Lissau v Southern Food Serv Inc, 159 F3d 177, 180-181 (CA 4, 1998); Pink v Modoc Indian Health Project Inc, 157 F3d 1185, 1189 (CA 9, 1998), cert den, 528 US 877 (1999); Gastineau v Fleet Mortgage Corp, 137 F3d 490, 493-494 (CA 7, 1998); Spencer v Ripley County State Bank, 123 F3d 690, 691-692 (CA 8, 1997); Bonomolo-Hagen v Clay Central-Everly Community School Dist, 121 F3d 446, 447 (CA 8, 1997); Wathen v General Elec Co, 115 F3d 400, 405-406 (CA 6, 1997); Kachmar v Sungard Data Sys Inc, 109 F3d 173, 184 (CA 3, 1997); Sheridan v E I DuPont de Nemours & Co, 100 F3d 1061, 1077-1078 (CA 3, 1996) (en banc), cert den, 521 US 1129 (1997); Haynes v Williams, 88 F3d 898, 901 (CA 10,1996); Williams v Banning, 72 F3d at 553-555; Tomka v Seiler Corp, 66 F3d 1295, 1313-1316 (CA 2, 1995); EEOC v AIC Security Investigations Ltd, 55 F3d 1276, 1280-1282 (CA 7, 1995); Gary v Long, 59 F3d 1391, 1399 (CA DC), cert den, 516 US 1011 (1995); Lenhardt v Basic Institute of Technology, 55 F3d 377, 379-381 (CA 8, 1995); Cross v Alabama Dep't of Mental Health, 49 F3d 1490, 1504 (CA 11, 1995); Birkbeck v Marvel Lighting Corp, 30 F3d 507, 510-511 (CA

In particular, the Jager court examined the Sixth Circuit's opinion in Wathen v General Electric Co, 115 F3d 400 (CA 6, 1997) in which the plaintiff argued that Title VII's inclusion of "agent" in the definition permitted her to sue her managers in their individual capacity (as well as her employer). The Sixth Circuit disagreed, holding that "[t]he majority of the courts addressing this issue have concluded that '[t]he obvious purpose of this agent provision was to incorporate respondeat superior liability in the statute.'" Id at 405-406 (quoting Miller v Maxwell's Int'l Inc, 991 F2d, 583, 587 (CA 9, 1993)). The Sixth Circuit concluded that, in context, the definition could not conceivably be read to impose individual liability. 115 F3d at 405-406. The Wathen court noted the United States Supreme Court has interpreted the inclusion of "agent" in Title VII's "employer" definition as an instruction to look to agency principles for guidance as to when an employer's vicarious liability will arise. Id at 406, citing Meritor Savings Bank v Vinson, 477 US 57, 72 (1986) (the definitional language "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII will be held responsible"). Because Congress (like the Michigan Legislature) did not define "agent" -- and not all employees or even supervisors are necessarily "agents" -- those limits on an employer's vicarious liability cannot be discerned from the statute itself but rather require reference to common law agency principles. Id.

The Wathen court further relied on the "employer" definitional language that

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4), cert den, 513 US 1058 (1994); Grant v Lone Star Co, 21 F3d 649, 652-653 (CA 5), cert den, 513 US 1015 (1994); Sauers v Salt Lake County, 1 F3d 1122, 1125 (CA 10, 1993); Miller v Maxwell's Int'l Inc, 991 F2d 583, 587-588 (CA 9, 1993), cert den, 510 US 1109 (1994). Only the First Circuit has yet to rule on this issue. In addition to following this Court's ruling in Chambers, the Court of Appeals in Jager turned to the federal precedents under Title VII -- as this Court has so often found is appropriate, especially where the Michigan Legislature borrowed essentially the same language from Title VII. See eg Haynie v State of Michigan, 468 Mich 302, 319-321; 664 NW2d 129 (2003); Chambers, 463 Mich at 313, 315.

excluded small employers (less than 15 employees) from Title VII coverage altogether. The court opined that the exclusion arose "'in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims.'" 115 F3d at 406 (quoting Miller v Maxwell's Int'l, 991 F2d at 587). In addition, while the exclusion of small employers was extensively debated by Congress, there was not a single reference to imposing individual liability on agents. 115 F3d at 406. On this basis, the Wathen court concluded it was "'inconceivable' that a Congress concerned with protecting small employers would simultaneously allow civil liability to run against individual employees." 115 F3d at 406 (quoting Tomka v Seiler, 66 F3d 1295, 1314 (CA 2, 1995)).[8]

Plaintiff's arguments do not lead to a different result. Plaintiff takes issue with the Jager court's reliance on Wathen because the Michigan Legislature did not limit its reach to larger employers. Plaintiff is incorrect. Borrowing from Title VII's definitional language, the Michigan Legislature indeed adopted an exclusion for small employers, i.e., those employing fewer than four employees. MCLA 37.2201, Historical and Statutory Notes. Just as Congress subsequently lowered the threshold from 25 to 15 employees, 1972 USCCAN 2137, 2155, the Michigan Legislature subsequently lowered the threshold from four to one. MCLA 37.2201, Historical and Statutory Notes. There is no reasonable basis to contend that the Michigan Legislature, by simply replacing "4" with "1," did so with the surreptitious motive of creating individual liability for agents. To

[8] See also Birkbeck v Marvel Lighting Corp, 30 F3d 510, 517 (CA 4, 1994) ("it would be incongruous to hold that the ADEA does not apply to the owner of a business employing, for example, ten people, but that it does apply with full force to a person who supervises the same number of workers in a company employing twenty or more"). The Age Discrimination in Employment Act (ADEA) has virtually the same definition of "employer" as Title VII, except it excludes those employers employing fewer than 20 employees. 29 USC § 630(b).

the contrary, the obvious reason for such an amendment, as with the similar amendment to Title VII, was to "merely increase[] the scope of employers covered rather than extend[] liability to individuals." Jager 252 Mich App at 483.

Review of the scant legislative history that exists confirms that the only intent of the Michigan Legislature in reducing the threshold was exactly as stated in Jager: the Legislature intended to correct an "apparent problem" by amending Elliott-Larsen "to apply to all employers [because] it currently only covers those employers with four or more employees." House Legislative Analysis Section, House Bill 4407 as enrolled Second Analysis (8-15-80) (emphasis in the original). The same Legislative Analysis pointed out that the four-employee requirement of the then-existing law left 43 percent of the State's private employers outside the ambit of Elliott-Larsen, a coverage issue that the Legislature intended to remedy with a single change: "To remedy this concern, the only one of the bill's provisions which would be necessary is that which would change the civil rights definition of an employer to 'a person who has one or more employees.'" Id. The Michigan Legislature gave no consideration to creating individual liability for agents. Rather, as with Congress in amending Title VII, the Michigan Legislature's only expressed concern was whether coverage should extend to all employers.

Plaintiff also argues that "several federal courts" refusing to recognize individual liability have relied on "the limited, equitable remedies which were originally available under [Title VII]." (Plaintiff's Brief, p 22). In contrast, Plaintiff argues, Elliott-Larsen, has always provided for an award of legal damages.

Plaintiff's distinction is one without a difference. Damages under Title VII were originally limited to injunctive relief, back pay and reinstatement, forms of equitable relief

that typically could only be obtained from the employer. Under Elliott-Larsen, relief is limited to "appropriate injunctive relief or damages, or both." MCL 37.2801(1); MSA 3.548(801)(1). "Damages" are defined, somewhat circularly, as "damages for injury or loss caused by each violation of this act." MCL 37.2801(3); MSA 3.548(801)(3). "Violations of this act" refers to violations of any provision of Elliott-Larsen, including not just Article 2 pertaining to discrimination in employment, but to other articles governing discrimination in public accommodations and services, education, and housing. What constitutes "appropriate" relief or damages under the statute, MCL 37.2801(1); MSA 3.548(801)(1), will therefore depend on the nature of the violation.

With respect to violations of the employment provisions of Elliott-Larsen, the most typical relief historically has been, as under Title VII, predominantly equitable in nature, i.e., back pay and reinstatement. Rasheed v Chrysler Corp, 445 Mich 109, 118-125; 517 NW2d 19 (1994); Smith v Charter Township of Union, 227 Mich App 358, 364-365; 575 NW2d 290 (1998). As under Title VII, it is only the employer, not a putative individual defendant, who can provide these remedies. The fact that Elliott-Larsen may also require an employer to pay compensatory damages for emotional distress under some circumstances, as Title VII now does as well, does not mandate imposition of individual liability under either Elliott-Larsen or Title VII. Accordingly, the Jager court did not err in following Wathen, nor did the Court of Appeals in this case err in finding itself bound by the ruling in Jager.

3. Plaintiff's Arguments Misconstrue When Resort To Rules Of Statutory Interpretation Is Appropriate.

Plaintiff cites a long list of opinions by this Court that, according to Plaintiff, stand for the proposition that no statutory construction may be applied in this case. Plaintiff is

simply wrong. Those cases cited by Plaintiff invoke statutory words that are capable of but one interpretation, which is not the case here. Williams v Banning, 72 F3d at 554 (statutory definition of employer "is ambiguous, susceptible of several possible meanings").

The cases cited by Plaintiff involve no ambiguity. See eg, People v McIntire, 461 Mich 147, 155-157; 599 NW2d 102 (1999) (criticizing lower court for not identifying ambiguity before applying rules of statutory interpretation); Roberts v Mecosta County General Hospital, 466 Mich 57, 64; 642 NW2d 663 (2002) (unambiguous cross-reference to another statutory provision); Robinson v City of Detroit, 462 Mich 439, 460; 613 NW2d 307 (2000) (court concluded Legislature understood difference between "the proximate cause" and "a proximate cause").

Of the remaining cases cited by Plaintiff, not one is inconsistent with the approach taken by the Jager court, and all support the Jager court's deference to the statutory context when language is capable of more than one meaning. See eg Tyler v Livonia Public Schools, 459 Mich 382, 390-391; 590 NW2d 560 (1999) (words must be read in the context of the statute); People v Cornell, 466 Mich 335, 341-355; 646 NW2d 127 (2002) (where statutory language capable of more than one interpretation, it is to be construed in light of its historical evolution); World Book Inc v Treasury Department, 459 Mich 403, 416-417; 590 NW2d 293 (1999) (court must read statute in context to resolve ambiguities or inconsistencies).

4. This Court Has Already Explained Why The Reference To "Agent" Is Not Surplusage.

Plaintiff also attacks Jager on the ground that it reduces the phrase "an agent of that person" to "surplusage." (Plaintiff's Brief, p 26). Plaintiff is wrong again. As the United States Supreme Court observed in Meritor Savings Bank, *supra*, the parallel

language of Title VII "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII will be held responsible." 477 US at 72. By expressly defining "employer" to include agents – while at the same time not defining "agent" – Congress (and the Michigan Legislature) intended that an employer's liability for acts of its employees would be determined by reference to common law agency principles. Id. After all, employers virtually always act only through their agents. St Clair Intermediate School Dist v Intermediate Educ Ass'n, 458 Mich 540, 559-560 and n21; 581 NW2d 707 (1998) (an employer's liability for its agents will not include every "person who acted in [the employer's] interests" but rather is limited to those persons on whom the employer has bestowed some authority to act). Similarly, for a principal to be held vicariously liable for the act of its agent, the agent must be acting within the scope of his or her authority -- actual or apparent.

This Court addressed these common law distinctions in Chambers v Trettco, *supra*. There, the Court held that, whether the issue is quid pro quo harassment or an alleged hostile environment, "it is always necessary to determine the extent of the employer's vicarious liability when harassment is committed by an agent." 463 Mich at 311. Precisely because the legislature defined "employer" as including "agents" of the employer, this Court held that it will "rely on common-law agency principles in determining when an employer is liable for sexual harassment committed by its employees." Id. Using those principles, the Court held in Chambers that an employer will always be liable for quid pro quo harassment, i.e., will be subject to strict liability, because the "harasser, by definition, uses the power of the employer to alter the terms and conditions of employment." Id. However, strict liability in a hostile environment case is "illogical" the Court reasoned, "because, generally, in such a case, 'the

supervisor acts outside the scope of actual or apparent authority to hire, fire, discipline, or promote.'" Chambers, 463 Mich at 311 (quoting Radtke v Everett, 442 Mich 368, 396 n 46; 501 NW2d 155 (1993)). Under such circumstances, liability will extend under common-law agency principles only to those situations where the employer has notice of the alleged harassment but fails to take appropriate action. "The bottom line is that, in cases involving a hostile work environment, a plaintiff must show some fault on the part of the employer." Chambers, 463 Mich at 312.[9]

The conclusion is inescapable that the Michigan Legislature's definition of an employer's liability to include the acts of agents under common law principles is not surplusage.

5. The Arguments of Amici Curiae Misconstrue The Law And Seek Only To Encourage Litigation.

In addition to echoing several of Plaintiff's arguments, the amici curiae argue that Elliott-Larsen -- and its definition of "employer" -- must be construed "in light of the common law remedies that it was intended to expand" (Brief of amici curiae, p 1), leading them to suggest that Jager's interpretation leaves a hostile environment victim without a remedy. They further argue that, without individual liability, alleged harassers will be given a "free pass," thereby discouraging female employees from reporting harassment and giving employers no incentive to take remedial action. (Id, pp. 12-13). All of these claims miss the mark.

The Michigan Legislature did not enact Elliott-Larsen to expand existing common

[9] Plaintiff misses the distinction in agency law between putative agents acting within the scope of actual or apparent authority and those acting outside of this authority, arguing that the Jager court's analysis would require imposition of strict liability in every case. (Plaintiff's Brief, p 27 n3). Similarly, the amici curiae confuse *respondeat superior* liability with direct liability in negligence. (Brief of amici curiae, p 15).

law remedies. Rather, the Legislature created a new cause of action, one that did not exist under the common law, which means that the enactment provides the exclusive remedy for that new right. Covell v Spengler, 141 Mich App 76, 82-83; 366 NW2d 76, lv den, 422 Mich 977; 374 NW2d 420 (1985). See also Hartleip v McNeilab Inc, 83 F3d 767, 778 (CA 6, 1996) (Elliott-Larsen is the exclusive remedy for sexual harassment). The fact that the remedy provided by Elliott-Larsen is against the employer only does not leave the plaintiff without a remedy, nor does it in any way suggest that the Legislature must have intended to impose individual liability. Williams v Banning, 72 F3d at 555.

On the other hand, there is no indication that Elliott-Larsen eliminated a plaintiff's ability to seek those tort remedies that existed under the common law and that have not been otherwise displaced or superceded by statute. While the common law did not impose liability on an employer for sexual harassment, the common law did protect an individual from such intentional torts as assault and battery perpetrated by another individual. At least one of the amici curiae, Justine Maldonado, and her counsel, Scheff & Washington, were well aware of this option in that Ms. Maldonado's lawsuit, as initially filed, alleged an assault and battery count against Mr. Bennett.[10] See Jager, 252 Mich App at 486 n14 ("a plaintiff can commence an action against a supervisor under traditional tort theories"); Akers v Alvey, 338 F3d 491, 496 (CA 6, 2003) (affirming dismissal of plaintiff's hostile environment claim but permitting her tort claim against her supervisor to proceed); Williams v Banning, 72 F3d at 555 ("If a victim of harassment suffers mental and emotional distress, embarrassment and humiliation so severe that

[10] Ms. Maldonado subsequently voluntarily dismissed this count, apparently to avoid a change of venue from Wayne County to Oakland County where the Wixom Plant is located.

even an employer's prompt action does not provide sufficient compensation, it is not unreasonable to assume that Congress intended the victim to turn to traditional tort remedies for redress").

This Court held in Eide v Kelsey Hayes Co, 431 Mich 26; 427 NW2d 488 (1988), that such existing tort remedies remain notwithstanding the enactment of Elliott-Larsen. The Court in Eide addressed whether Elliott-Larsen displaced a spouse's loss of consortium claim. As the Court noted, a cause of action for loss of consortium had long existed at common law and was available whenever a violation of an individual's legal rights resulted in damage to the individual's spouse. Id at 29. In enacting Elliott-Larsen, the Legislature did not create a new spousal right, so as to "occupy the field" with respect to that right. Similarly, Plaintiff here had at common law the right to sue another individual for assault and battery and similar intentional torts. Precisely because Elliott-Larsen did not create a new cause of action against individual defendants, Plaintiff retained that right.

The remaining argument of the amici curiae defies reason. They assert that, in the absence of individual liability, women will not report sexual harassment, thus giving alleged harassers a "free pass," which would defeat Elliott-Larsen's purpose. (Brief of amici curiae, pp 11, 13). As this Court has held, a plaintiff should seek relief from the court system only if and when her employer fails to take appropriate action after the plaintiff has given notice to the employer of the sexual harassment at issue. Chambers v Trettco, 463 Mich at 316; Radtke v Everett, 442 Mich at 395 n 41. If anything, confining liability to employers should encourage victims to report harassers to higher management. Once an employee has given notice, Elliott-Larsen motivates the employer to investigate and take appropriate remedial action because, if it does not, it

can be held liable. This liability attaches whether or not Elliott-Larsen were interpreted to create individual liability. Stated differently, the employer's incentive to take appropriate action is the same regardless of whether the supervisor can also be held individually liable.

Nor is there any factual basis to claim that individual harassers will receive a "free pass." When a complaint to the employer has validity, the law requires the employer to take remedial action, up to and including terminating the accused harasser if the circumstances so require. The employer that receives notice and fails to remedy the misconduct does so at its peril, and the harasser continues to face liability under common law tort theories.

B. The Trial Court Did Not Abuse Its Discretion By Excluding Evidence Of Mr. Bennett's Subsequently Expunged Misdemeanor Conviction.

Defendants filed a joint motion *in limine* to exclude from evidence at trial any reference to Mr. Bennett's 1995 misdemeanor conviction for off-duty, off-premises misconduct, a conviction that has since been expunged.[11] The trial court, after full briefing and argument, granted the motion. In doing so, the trial court did not abuse its discretion, a standard of review Plaintiff seemingly ignores here.

Plaintiff vacillates between claiming she did not need the misdemeanor conviction to avoid a directed verdict (Plaintiff's Brief p 42-46), and claiming the conviction "represented the essential background fact" that is alone "sufficient to reverse [the] directed verdict." (Id, p 36). Nevertheless, whether Plaintiff did not need it or could not prove her case without it, the trial court did not abuse its discretion in excluding it -

[11] Plaintiff fabricates and embellishes the facts surrounding the arrest and conviction. Just as an example, Mr. Bennett's sentence consisted of a fine and community service, not "psychiatric therapy." (Plaintiff's Brief p 29).

because the conviction for non-workplace conduct with strangers was, as its core, irrelevant. At the most, it was so marginally probative and so overwhelmingly prejudicial that Plaintiff's only possible justification for its admission was a prohibited one, i.e., she wanted the conviction admitted to prove Mr. Bennett had a propensity to engage in sexual misconduct, and hence must have done so with respect to Plaintiff. That is a quintessentially improper purpose for admission.

In reviewing Defendants' joint motion *in limine,* the trial court analyzed the admissibility of the conviction under MRE 404(b) and the four-pronged test in People v VanderVliet, 444 Mich 52, 74; 508 NW2d 114 (1993). (Apx. 64a-67a). The VanderVliet test is as follows:

> The evidence must be relevant to an issue other than propensity under Rule 404(b), to "protect[] against the introduction of extrinsic act evidence when that evidence is offered solely to prove character." *Id* at 687. (Emphasis added). Stated otherwise, the prosecutor must offer the other acts evidence under something other than a character to conduct theory.
>
> Second, as previously noted, the evidence must be relevant under Rule 402, as enforced through Rule 104(b), to an issue or fact of consequence at trial. 2 Weinsten & Berger, Evidence, ¶ 404[08], p 404-49.
>
> Third, the trial judge should employ the balancing process under Rule 403. Other acts evidence is not admissible simply because it does not violate Rule 404(b). Rather, a "determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403." 28 USCA, p 196, advisory committee notes to FRE 404(b).
>
> Finally, the trial court, upon request, may provide a limiting instruction under Rule 105.

444 Mich at 74-75.

With regard to the admissibility of the evidence against Mr. Bennett, the trial court held that Plaintiff had failed to identify a proper purpose under MRE 404(b) to admit the evidence. The trial court further excluded the evidence with regard to Mr. Bennett under the third prong of VanderVliet, MRE 403,

> In addition to that, even under the third prong [of VanderVliet], even if it [the conviction] were relevant, I think the undue prejudice substantially outweighs the probative value of this evidence in view of other means of proof, and that is, other people, the plaintiff's testimony and so forth. Therefore, as to Mr. Bennett, it is not going to be allowed into evidence.

(Apx. 66a). As to Ford, the trial court considered, but did not decide, whether Plaintiff had articulated a proper purpose under MRE 404(b). The trial court made clear that its overriding concern was the MRE 403 prong of the VanderVliet test i.e., "that the prejudice to Ford substantially outweighs any probative value this evidence might have." As the court opined, its overwhelming concern was that, even with a limiting instruction, the jury would treat the conviction as propensity evidence. (Apx. 66a-67a).

The Court of Appeals reviewed both of these MRE 403 rulings -- as to Ford and to Mr. Bennett -- under an abuse of discretion standard. (Apx. 50a-51a). Even if Plaintiff's arguments suggested that the trial court had been presented with a "close evidentiary question" regarding the admissibility of the conviction (which is not the case), "[t]he trial court's decision on close evidentiary questions cannot 'by definition' be an abuse of discretion." People v Layher, 464 Mich 756, 761; 631 NW2d 281 (2001). See also People v Hine, 467 Mich 242, 250; 650 NW2d 659 (2002) ("An abuse of discretion occurs 'when the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but [the] defiance [of it].'").

1. The Conviction Was Not Notice To Ford That Plaintiff Was Being Subjected To A Sexually Hostile Work Environment.

Plaintiff argued that the conviction was relevant to her hostile environment sexual harassment claim under the first prong of VanderVliet, i.e., that there was a proper purpose for admitting the evidence under MRE 404(b). Specifically, Plaintiff asserted that the 1995 misdemeanor conviction for off-premises, off-duty misdemeanor conduct involving individuals with no connection to Ford was "notice" to Ford that in 1999 Plaintiff was being subjected to a sexually hostile work environment. Because the conviction was not notice to Ford as a matter of law, the trial court did not abuse its discretion in excluding it under VanderVliet.

In Radtke v Everett, *supra*, this Court held that an employer can be liable for a sexually hostile work environment created by its agent only if "the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action." 442 Mich at 395 n41 (emphasis added). See also Chambers v Trettco, 463 Mich at 316 (employer can be vicariously liable for a hostile work environment only if it "failed to take prompt and adequate remedial action upon reasonable notice of the creation of a hostile work environment)" (emphasis added).

Plaintiff tries to convince this Court, as she did the courts below, that Mr. Bennett's subsequently expunged record for off-premises conduct involving individuals never employed by Ford was itself "sexual harassment" and therefore "notice" that Mr. Bennett would sexually harass employees in the workplace, particularly Plaintiff. The gist of Plaintiff's argument is really this: any time an employer receives information that someone claims one of its employees has engaged in impermissible off-premises

conduct with non-employees in a presumptively anonymous situation, the employer is on permanent notice that the employee is also risking his employment -- in a venue in which his identity is well known -- to sexually harass virtually every female employee he encounters. There is absolutely no authority for this illogical leap from off-duty off-premises conduct with strangers to the workplace. Indeed, the case law that has addressed this issue is to the contrary. See eg, Tomson v Stephan, 705 F Supp 530, 536 (DC Kan, 1989) (excluding evidence that defendant made sexual advances outside the employment setting because the advances were not made toward an employee: "Although the woman may have been the victim of an unwelcome sexual advance, she was not a victim of sexual harassment"). Accord, Longmire v Alabama State Univ, 151 FRD 414, 417 (DC, MD Ala, 1992) (Defendant's "activities outside the workplace are irrelevant" to determining existence of hostile work environment).[12]

[12] The amici curiae cite Ferris v Delta Air Lines Inc, 277 F3d 128 (CA 2, 2001), cert den, 537 US 824 (2002) for the proposition that off-premises conduct with strangers can constitute workplace misconduct. The amici curiae are wrong. In Ferris, the plaintiff, a female flight attendant, was drugged and raped by a male co-worker in a hotel room while the two were on a lay-over in a foreign country. 277 F3d at 131-132. On an earlier foreign lay-over, the same male co-worker had raped another female flight attendant in her hotel room. This flight attendant promptly reported the sexual assault to Delta. Id at 132. While on yet another foreign trip, the male co-worker had made sexually suggestive remarks to another female flight attendant, only to become belligerent and threatening when that flight attendant turned down his dinner invitation. That flight attendant also promptly reported the male co-worker. Id at 133-134. On these facts, the court considered whether off-premises conduct could ever be considered to have occurred in a "work environment." In doing so, the court concluded that, in the limited and unusual circumstances before it, i.e, an employer-supplied hotel room in a foreign country, it might. Even in those extraordinary circumstances, however, "the question [was a] close [one]." Id at 135. Nothing about the events underlying Mr. Bennett's expunged conviction even suggests that the off-premises events in this case occurred in a "work environment" as that term is defined in Ferris. The three females who allegedly were "victims" were not employed by Ford and were not put into an off-premises situation by Ford. They were complete strangers to Mr. Bennett and to Ford. Whatever happened to them did not occur in anyone's work environment and therefore could not conceivably constitute "a sexually hostile work environment." Radtke, 442 Mich at 395 n41.

2. Plaintiff Misconstrues The "Totality Of The Circumstances" Concept With Respect To Notice.

Plaintiff's argument that Chambers v Trettco compels a different result because of its "totality of circumstances" language completely mischaracterizes this Court's opinion. Plaintiff posits that the misdemeanor conviction had to be admitted because the conviction, when combined with Plaintiff's non-sexual complaints about Mr. Bennett, was sufficient to establish "notice" under the "totality of the circumstances." (Plaintiff's Brief, pp 30-31). Plaintiff is incorrect.

Chambers did not jettison all considerations of relevance and unfair prejudice simply by using the term "totality of the circumstances." The Court plainly was referring to a plaintiff's work environment, circumstances relevant to the plaintiff's work environment, and the employer's knowledge of the plaintiff's work environment. The trial court always has an obligation to exclude evidence that is not relevant to the Plaintiff's work environment or that is more prejudicial than probative.

This Court's decision in Chambers must be read to place a burden on Plaintiff to provide notice that Plaintiff was being sexually harassed, a burden she could fulfill in one of only two ways. The simplest way to sustain the burden was to complain to Ford's upper management that Mr. Bennett was engaging in sexual misconduct towards her. The other way was for Mr. Bennett's misconduct to have been so open, numerous, notorious and egregious that the fact finder could reasonably infer Ford knew Plaintiff was being harassed.

In Chambers, the Court forcefully reaffirmed the cardinal principle that employer liability under Elliott-Larsen is predicated on employer fault, and that it is Plaintiff's burden to prove employer fault. 463 Mich at 312. In this regard, this Court expressly held that no burden shifts to the employer to disprove negligence; rather the "central

question" is "whether defendant failed to take prompt and appropriate remedial action after receiving notice that [the accused] was sexually harassing Plaintiff." 463 Mich at 318-319 (emphasis added).

In reviewing "controlling legal principles regarding sexual harassment under Michigan law," 463 Mich at 315, the Court did not repeat what it had already decided in Radtke v Everett, i.e., that "'the employer has a duty to investigate and take prompt remedial action . . . only if it has actual or constructive notice of the offensive environment.'" Radtke, 442 Mich at 396 and n44 (quoting Downer v Detroit Receiving Hosp, 191 Mich App 232, 235 (1991) and emphasis added). The Court did, however, transfer Radtke's "totality of the circumstances" concept that an objective (not subjective) standard must apply, to the notice requirement. [13] In so doing, the Court relied on a federal case, Perry v Harris Chernin Inc, 126 F3d 1010 (CA 7, 1997), that addressed the notice requirement with more specificity. Chambers, 463 Mich at 319. In Perry, the Seventh Circuit held that the plaintiff did not provide either actual or constructive notice because she did not report the conduct despite the availability of a complaint procedure, and because no one witnessed the alleged perpetrator engaging in sexually inappropriate conduct toward the plaintiff. Perry, 126 F3d at 1014. To find the employer liable where the plaintiff did not report the conduct and no one witnessed it, would equate with the imposition of strict liability. Id.

Reading Mr. Bennett's conviction as constructive notice is wholly inconsistent with the legal framework articulated in Chambers. To find an employer "on notice"

[13] Radtke held that whether or not conduct is severe and pervasive, so as to rise to the level of a hostile work environment, must be determined on an objective basis, i.e., the "totality of the circumstances," rather than by examining the plaintiff's subjective evaluation. Radtke, 442 Mich at 387.

concerning Plaintiff based on someone else's complaint or off-premises misconduct would shift the burden to the employer to disprove negligence, a standard this Court expressly rejected. Chambers, 463 Mich at 314-315 (rejecting federal standard because "under this new federal rule, an employer, essentially, must establish affirmatively that it was not negligent in failing to prevent the harassment").

Moreover, admitting Mr. Bennett's conviction as part of the "totality of circumstances" would run counter to that concept as explained by the Court in Chambers. This is because Chambers identified the parameters of those "circumstances" by reference to the Michigan Legislature's definition of a sexually hostile work environment. Specifically, hostile environment sexual harassment is "'unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature [where] the conduct or communication has the purpose or effect of substantially interfering with an individual's employment.'" Chambers, 463 Mich at 310 (quoting MCL 37.2103(i); MSA 3.548(103)(i)) (emphasis added). Nowhere did Chambers suggest that the work environment is so expansive as to include non-workplace conduct with non-employees, nor have Defendants located any judicial precedent for such a notion.

The Court of Appeals rejected a similarly overly-expansive reading of "notice" under the "totality of the circumstances" approach in Sheridan v Forest Hills Public Schools, 247 Mich App 611, 621; 637 NW2d 536 (2001). To show actual notice, the court held, plaintiff had to "show that she complained to higher management of the harassment." Id (quoting McCarthy v State Farm Ins Co, 170 Mich App 451, 457; 428 NW2d 692 (1988)). To demonstrate constructive notice, the plaintiff had to show the harassment was so pervasive that the employer's knowledge that the plaintiff's work

environment was sexually hostile may be inferred. Id. Constructive notice is not found where other employees complain about the same alleged harasser having harassed them. 247 Mich App at 628. At minimum, the plaintiff has "to demonstrate that the harassment was so pervasive that [the employer] should have been alerted to the possibility that plaintiff was being harassed." Jager v Nationwide Truck Brokers, 252 Mich App at 477 (emphasis added).[14]

According to Plaintiff here, Mr. Bennett's misdemeanor conviction should have been admitted because the conviction plus her non-sexual complaints about Mr. Bennett were sufficient to constitute "constructive notice" under the "totality of the circumstances." In Sheridan, the plaintiff made and lost virtually the same argument, even though the harassment allegations in that case (unlike here) all pertained to workplace conduct. The Sheridan plaintiff had argued that her employer was on constructive notice by virtue of (1) earlier complaints by two other employees (one substantiated and the other not investigated) that the same perpetrator had sexually harassed them; and (2) the plaintiff's own generalized and non-sexual complaints about the perpetrator. 247 Mich App at 627-628. The Court of Appeals held that the prior sexual harassment complaints by others concerning the same alleged perpetrator coupled with the plaintiff's generalized complaints to upper management about the

[14] As one court recognized, the practical difference between the notice requirement under Elliott-Larsen and under federal law is that conduct sufficient to raise a question of fact under federal law will often fail under Elliott-Larsen. Marquis v Tecumseh Prod Co, 206 FRD 132, 174-177 (ED Mich 2002). In Marquis, the court found that there was neither actual nor constructive notice where the alleged misconduct may have been witnessed by co-workers, but was not reported to upper management. Similarly, even under the lesser federal requirement, courts have held that constructive notice requires more than the severe and pervasive standard required to establish a hostile environment. See eg, Ford v West, 222 F3d 767, 776 (CA 10, 2000) (acts must be "so egregious, numerous and concentrated as to add up to a campaign of harassment".

alleged perpetrator were not constructive notice because they provided "no basis on which to conclude that sexual harassment relating to plaintiff was occurring." Id at 628 (emphasis added). See also Chambers, 463 Mich at 318-319 ("central question" is "whether defendant failed to take prompt and adequate remedial action after receiving notice that [the accused] was sexually harassing plaintiff") (emphasis added). In short, because the conduct involving other employees was not part of the plaintiff's own work environment, the conduct was not notice as to the plaintiff, under the "totality of the circumstances" or any other accepted legal standard.

Plaintiff's proffered evidence of "constructive notice" here is far less substantial than that in Sheridan for at least two reasons. First, the "prior acts" evidence in Sheridan at least involved acknowledged workplace sexual misconduct with other employees rather than off-premises conduct with strangers.[15] Second, it is undisputed that Plaintiff's "generalized complaints" were expressly non-sexual. Indeed, Plaintiff's complaints about Mr. Bennett, if he was really engaging in sexual misconduct, appear calculated to deprive Ford of any knowledge of sexual misconduct. For example, the psychologist's letters Plaintiff references on pages 32 through 33 of her Brief make several allegations, including a few about Mr. Bennett, but they do not reference sexual conduct at all. (Apx. pp. 325a - 327a). Moreover, the letters are not even addressed to Ford management. They were addressed to the Wixom Plant Physician, and Plaintiff presented no evidence that the physician forwarded sensitive medical communications

[15] The amici curiae lump together the conviction and Justine Maldonado's testimony that Ms. Maldonado reported Mr. Bennett as having sexually harassed Ms. Maldonado. As in Sheridan, even if Ms. Maldonado had reported Mr. Bennett (Ford's records show no report until December 1999, after Plaintiff filed her lawsuit), Ms. Maldonado's complaint, coupled with Plaintiff's generalized complaints about the same alleged perpetrator, provided "no basis on which to conclude sexual harassment relating to plaintiff was occurring." Sheridan, 247 Mich App at 628 (emphasis added).

to Ford management. One letter to the Wixom Plant Manager (Plaintiff's Brief, p. 44) addressed only Plaintiff's problems with her co-worker Ms. Holcomb and not Mr. Bennett. (Apx. 177b-181b, 237b-241b). Even Plaintiff acknowledged that the letter from her son-in-law, Paul Lulgjuraj (Apx. 328a), did not and was not intended to convey a complaint of sexual harassment, but rather was to notify Ford that Plaintiff was accusing Ms. Holcomb of threatening her life. (Apx. 61b-68b).[16]

Plaintiff does not disclose to this Court (in her Brief or in her Appendix) her own labor relations complaints and grievances that she filed with the Wixom Plant during this time frame. Had she done so, this Court would see, as did the trial court and the Court of Appeals, that Plaintiff's "generalized complaints" about Mr. Bennett concerned very specific topics that, by Plaintiff's own admission, had nothing to do with alleged sexual harassment. (Apx. 115b).

The complaints Plaintiff made to Ford about Mr. Bennett, in fact, involved Plaintiff's manipulative efforts beginning in April 1997 to avoid a "shift bump" under the collective bargaining agreement and her attempts to avoid subsequent bumps when the April and October 1998 bump seasons rolled around. (Apx. 70b-71b). These are detailed earlier in this Brief (Section I.C., D., *supra*). When Mr. Bennett would not cooperate with her attempts to abuse the system, Plaintiff filed a flurry of complaints that accused him of an assortment of "harassing" conduct, none of which was in any way sexual. These were very similar to the litany of complaints she had filed (and emotions she had expressed) several years earlier regarding her union committeeman, Mr.

[16] Similarly, Plaintiff's reference to her August 1998 conversation with "a Labor Relations Investigator" (Plaintiff's Brief, p 33) was part of the litany of complaints Plaintiff made about Ms. Holcomb. Plaintiff merely referenced Mr. Bennett in a few of these complaints in the context of Mr. Bennett allegedly being friends and colluding with Ms. Holcomb. (Apx. 242b-254b). See *supra*, Section I.D.

McKeever, when he refused to help her obtain her preferred shift. (Apx. 72b-73b, 213B-221B, 257b-260b). Thus, Plaintiff was given the opportunity to -- and did -- voice her specific complaints about how Mr. Bennett was "harassing" her. Never once did she say a word about her problems with Mr. Bennett being sexual. (Apx. 115b).

The other element of the "totality of the circumstances" Plaintiff neglects to mention is that when she wanted to accuse someone of sexual harassment, as with Mr. McKeever, she expressly said so. (Apx. 214b). While Plaintiff tried to hide her earlier (and admittedly false) sexual harassment complaint against Mr. McKeever from the jury, she ultimately confessed to her own deceit when the trial court granted Defendants' motion to admit testimony by a handwriting expert. (Apx. 145b-160b). Because the conviction for off-premises, off-duty conduct with strangers was not notice of any misconduct in Plaintiff's workplace, the trial court did not abuse its discretion in excluding it.

3. Plaintiff Misapplies The "Otherwise Ambiguous Acts" Theory.

Finally, Plaintiff suggests in her Brief that Hurley v Atlantic City Police Department, 174 F3d 95 (CA 3, 1999), supports her argument that non-workplace conduct with anonymous strangers is admissible to explain "otherwise ambiguous acts." (Plaintiff's Brief, p 32). In Hurley, the defendant-employer argued that the plaintiff misinterpreted "trivial horseplay" directed at male and female employees alike as sexually hostile. Id at 111. On these facts, the Third Circuit held that the trial court did not abuse its discretion in admitting testimony of other female employees that they been subjected to similar sexual innuendo in the workplace. Id. Significantly, the Third Circuit went on to hold that this type of testimony was "highly relevant" to the affirmative defense analysis adopted by the United States Supreme Court in Faragher v Boca

Raton, 524 US 775; 118 S Ct 2275; 141 LEd2d 662 (1998), and Burlington Industries Inc v Ellerth, 524 US 742; 118 S Ct 2257; 141 LEd2d 633 (1998) -- an analysis expressly rejected by this Court in Chambers v Trettco. 463 Mich at 315-316.

The issue here is not whether Mr. Bennett's actions toward Plaintiff were ambiguous. Plaintiff's testimony at trial was that Mr. Bennett engaged in blatantly unambiguous sexual misconduct, including exposing himself and masturbating. At no time did Defendants attempt to defend this case on the theory that, if the alleged misconduct took place, it was "trivial horseplay." Thus, even if the Ellerth/Faragher affirmative defense was an issue here (it is not), Hurley can have no application.[17]

4. The Danger Of Undue Prejudice Substantially Outweighed Any Arguable Probative Value.

Plaintiff cannot make up her mind whether the conviction was "essential" to her case (Plaintiff's Brief, p 30), or really not needed at all. (Id, p 42). When arguing the conviction is "essential" to proving notice, Plaintiff claims the conviction should have been admitted under the "sliding scale" approach to MRE 403 set forth in People v Mills, 450 Mich 61; 537 NW2d 909 (1995). Without citation to any authority, Plaintiff them claims that "the evidence of Bennett's conviction would have been sufficient to reverse the directed verdict." (Plaintiff's Brief, p 36).

Mills does not declare the proposition that probative evidence must always be admitted, regardless of the level of prejudice, if it is the only evidence that supports a party's theory of the case. Plaintiff's apparent interpretation of Mills is classic

[17] Mancini v Township of Teaneak, 349 NJ Super 527; 794 A2d 185 (2002), also cited by Plaintiff, is similarly inopposite. The issue in that case was whether the trial court abused its discretion in permitting other female employees to testify they had been sexually harassed by the same perpetrator. 794 A2d at 206. That case did not involve non-workplace misconduct with strangers.

bootstrapping. If admissibility were tested by that which is necessary to avoid a directed verdict, evidence of character to prove propensity would be admitted despite the strictures of MRE 404(b). By like reasoning, a prosecutor in a criminal case might claim any prior conviction was admissible if essential to avoid a dismissal.

Mills did not even involve the evidentiary scenario Plaintiff suggests. Rather, the question in Mills was whether the trial court abused its discretion in admitting photographs to show the extent of a victim's injuries when there was already testimony on that issue. No one in Mills disagreed that evidence concerning the injuries was relevant and should be admitted; the dispute was over how much evidence should be admitted.

The issue in this case was not how much evidence of Mr. Bennett's conviction should be admitted. Rather, the question decided by the trial court was whether the conviction should be admitted at all. The trial court determined that, to the extent the conviction had any relevance, its prejudicial effect substantially outweighed any arguable probative value. Therefore, even if there were some validity to Plaintiff's interpretation of Mills, the conviction is at most the "marginally probative evidence [that] will be given undue or preemptive weight by the jury," which goes to the heart of MRE 403. Simply put, Plaintiff points to no authority -- nor is there any -- that stands for the novel proposition that off-duty, off-premises off-duty misconduct involving strangers is somehow "notice" to Ford of sexual harassment affecting Plaintiff's work environment.

Indeed, Plaintiff's insistence that the conviction had to come into evidence even though it could not establish "notice" exposes Plaintiff's reliance on the conviction for what it is. Plaintiff wanted the evidence admitted, not because it was "notice," but for the immensely prejudicial and inflammatory impact Plaintiff expected it would have on

the jury. It was through this "prism" of MRE 403 that the trial court excluded the evidence.

Other courts have found it is an abuse of discretion to admit such attenuated sensationalized evidence. For example, in Bhaya v Westinghouse Elec Co, 922 F2d 184 (CA 3, 1990), cert den, 501 US 1217 (1991), the Third Circuit held that evidence suggesting the plaintiff's management engaged in illegal conduct not directly tied to the decision the plaintiff challenged as discriminatory required a new trial. Id at 187-188. The court opined that "the jury probably was left with the impression that [Westinghouse's] managers were a lawless bunch." Id at 188. See also Schrand v Federal Pacific Elec Co, 851 F2d 152 (CA 6, 1988) (reversible error under the federal equivalent to MRE 402 and 403 to admit evidence of others with claims similar to plaintiff, but who were not similarly situated to plaintiff).

Mills does not help Plaintiff here. Indeed, if there is a seminal opinion that warrants this Court's attention on this issue, it is Bruton v United States, 391 US 123 (1968), in which the U.S. Supreme Court recognized that even the most direct and probative evidence must be excluded where limiting instructions cannot adequately remedy the undue prejudice. The question before the trial court was not "close," but even if it had been, the Court of Appeals correctly concluded that the trial court's ruling was not abuse of discretion. (Apx. 51a).[18]

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[18] Plaintiff also criticizes the trial court for not revisiting this *in limine* ruling. (Plaintiff's Brief, p 36). In fact, the trial court revisited the *in limine* ruling on at least two occasions before trial. On neither occasion did Plaintiff argue or the court hold that the conviction was evidence sufficient to submit the case to a jury. Indeed, at no time did the court depart from its assessment that the conviction's probative value was substantially outweighed by the potential for undue prejudice. (Apx. 18b-29b). Moreover, while Plaintiff criticizes the trial court for not revisiting the issue a third time in the context of Defendants' directed verdict motion, Plaintiff did not raise the conviction as evidence that should be considered in evaluating that motion. (Apx. 207b-211b).

C. For Similar And Additional Reasons, The Trial Court Did Not Abuse Its Discretion In Excluding The Conviction As To Defendant Bennett.

The trial court excluded Mr. Bennett's 1995 misdemeanor conviction as to both Defendants. Similar and several additional considerations apply specifically to Mr. Bennett, and likewise establish that the trial court's ruling was not an abuse of discretion as to him.

1. Mr. Bennett's 1995 Misdemeanor Conviction Was Inadmissible Under MRE 404(a) and (b).

MRE 404(a) prohibits evidence of "character" to prove action in conformity therewith, and MRE 404(b) specifically prohibits the introduction of "other crimes, wrongs, or acts" in order to prove the character of a person or to show action in conformity therewith. Persichini v William Beaumont Hosp, 238 Mich App 626, 632; 607 NW2d 100 (1999). Thus, the trial court correctly held that Mr. Bennett's prior conviction could not be admitted to show that he had a predilection toward sexual misconduct and that he acted in that way toward Plaintiff. Gainey v Sieloff, 163 Mich App 538, 553; 415 NW2d 268 (1987) (improper to admit evidence of prior judgments against the defendant-officers for use of excessive force to show that defendants were more likely to have used excessive force against [the plaintiff]").

Plaintiff's claim is that the conviction should have been admitted under one of the enumerated purposes permitted under MRE 404(b), specifically that Mr. Bennett operated pursuant to a "common plan, scheme, or system." (Plaintiff's Brief, p 38). According to Plaintiff, the trial court had no choice but to admit the conviction under People v Sabin, 463 Mich 43; 614 NW2d 888 (2000). Sabin does not compel or even support the result Plaintiff advocates.

For evidence of "other crimes, wrongs, or acts" to be admitted for a purpose

permitted under MRE 404(b), such as evidence of a common plan or scheme, the prior act must have probative value other than its tendency to show a propensity to commit such acts. In People v Engleman, 434 Mich 204; 453 NW2d 656 (1990), this Court explained that there are only three ultimate issues for which prior acts evidence may, in the trial court's discretion, be admitted: (1) identity; (2) mental state; and (3) actus reus, i.e., as proof that the charged act was committed. 434 Mich at 215. Identity was not at issue, nor was Mr. Bennett's mental state an element of Plaintiff's hostile environment claim. Where, as here, the ultimate issue for which the evidence is proffered is proof that the charged act was committed, courts should be "understandably more reluctant" to allow the evidence:

> "When the prosecutor offers uncharged misconduct to prove the commission of the actus reus, the judge should very carefully scrutinize the prosecutor's theory of logical relevance. This is the theory of relevance in which it is easiest for the prosecutor to slip into improper character reasoning. Since the ultimate inference is conduct, this theory places the greatest strain on the prohibition in the first sentence of Rule 404(b). The courts are reluctant to admit uncharged misconduct to prove the actus reus, and that reluctance is well founded."

Id, 434 Mich at 215-216 (quoting Imwinkelried, Uncharged Misconduct Evidence, § 4:01, p 5).

Because it is but a thread-like fine line that divides impermissible character evidence from permissible other acts evidence to prove misconduct was committed, only other acts evidence that establishes an intermediate inference that, in turn, proves that the defendant indeed engaged in the charged conduct is, in the trial court's discretion, admissible. One such intermediate inference is evidence that a defendant devised a common plan or scheme of which the charged misconduct is but one manifestation among many. Engelman, 434 Mich at 217-219. Evidence sufficient to

establish a common plan or scheme requires "'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.'" Sabin, 463 Mich at 64 (quoting Wigmore, Evidence (Chadbourn rev) § 304, pp 250-251). More specifically, there must be more in common than "'the same doer, and the same sort of act, but not necessarily the same mode of acting nor the same sufferer,'" i.e., more than the lesser standard that may be sufficient where the issue is intent rather than common plan or scheme. Id. Rather, "'the combination of features that will suggest a common plan as their explanation involves so much higher a grade of similarity as to constitute a substantially new and distinct test.'" Id.

The prior acts evidence here lacked the requisite "concurrence of common features." An act of indecent exposure outside the workplace involving anonymous non-employees is not sufficiently similar to sexually harassing an employee in the workplace to have been probative. See Scott v Hurd-Corrigan Moving & Storage Co, 103 Mich App 322, 342; 302 NW2d 867 (1981) (evidence of prior insurance fraud not sufficiently similar to be probative of fraudulent intent in a commercial transaction); Tomson v Stephan, *supra*, 705 F Supp at 536 (unwelcome sexual advance toward waitress in social setting not probative of sexual harassment in the workplace). Indeed, the only arguable common features here were Plaintiff's allegations of "the same doer" (Mr. Bennett) and "the same sort of act" (exposure). As Sabin expressly held, there must be more in common than "'the same doer, and the same sort of act'" to overcome MRE 404(b)'s limitations. 463 Mich at 64.

Sabin does not help Plaintiff for another reason. In Sabin, this Court held that "reasonable persons could disagree on whether the charged and uncharged acts

contained sufficient common features to infer the existence of a common system used by defendant in committing the acts." 463 Mich at 67. Where it is a close call, as in Sabin, the decision to admit or exclude the "other acts" evidence "ordinarily cannot be an abuse of discretion." Id. See also People v Hine, 467 Mich at 250 ("abuse of discretion involves far more than a difference of opinion" concerning degree of similarity).

The common features deemed sufficient in Sabin were that the victims were daughters of the defendant, were both sexually abused at the same approximate (young) age, were both members of the defendant's household when the abuse occurred, and were both threatened that reporting the abuse would break up the family home. 463 Mich at 66. Under these circumstances, the Court concluded, "[o]ne could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetuate abuse." Id. As the Court further opined, "[a]lthough we sympathize with the trial courts in their struggle with evidentiary rulings in sexual abuse cases involving children, our evidentiary rules require that trial courts engage in the inquiry." Id at 60.[19]

Plaintiff's claim here was not one of criminal sexual abuse of a child in the defendant's household. The striking similarities of family relationships, living arrangements, and tender years that were critical to the common scheme or plan in

[19] The Court has given similar latitude to prosecutors in other sexual abuse cases involving minor children residing in the defendant's household. See People v Starr, 457 Mich 490, 503; 577 NW2d 673 (1998) (other acts evidence admissible to prove actus reus based on "striking similarity between the half-sister's age, living arrangement, and relationship with the defendant at the time the abuse began, to that of the victim"). See also People v DetMartzek, 390 Mich 410, 414; 213 NW2d 97 (1973) (drawing evidentiary distinctions in statutory rape and incest cases because of natural tendency to disbelieve allegations that seem "unnatural").

Sabin are absent here. Accordingly, the "close evidentiary question" in Sabin was not even a question in this case, and the abundance of caution urged in Engelman when "other acts" evidence is offered to ultimately prove actus reus applies with full force.

2. The Trial Court Properly Excluded The Conviction Evidence Under MRE 403's Balancing Requirement.

Even if the prior acts evidence arguably fit within the periphery of the common plan or scheme standard, it nonetheless failed the MRE 403 balancing requirement. As this Court has held, "other acts evidence is not admissible simply because it does not violate Rule 404(b). Rather, a 'determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403.'" People v VanderVliet, 444 Mich at 75 (quoting, 28 USCA, p 196, advisory committee notes to FRE 404(b)) (alteration by the Court). See also People v Allen, 429 Mich 558, 596; 420 NW2d 499 (1988) ("prior convictions for non-theft crimes which do not contain elements of dishonesty or false statement should never be admitted into evidence" because of the "strong potential for prejudice" and risk that the jury will conclude that the defendant has "a bad general character").

As just noted, in Sabin, this Court found it was not an abuse of discretion to admit the evidence, nor would it have been an abuse of discretion to exclude it. Here, where the similarities are far less compelling and the danger of undue prejudice and juror confusion is overwhelming, the trial court plainly did not abuse its discretion in excluding the evidence, and the Court of Appeals did not err in its affirmance.

D. The Trial Court Properly Granted A Directed Verdict Because Plaintiff Did Not Adduce Evidence Of *Respondeat Superior* In The Form Of Notice To Ford.

Plaintiff claims that -- with or without Mr. Bennett's conviction -- she presented notice to Ford sufficient to establish *respondeat superior* liability. According to Plaintiff, she provided actual notice by reporting Mr. Bennett's conduct to two first-line supervisors. With respect to constructive notice, Plaintiff repeats her "totality of the circumstances" arguments addressed above, i.e., that her non-sexual complaints against Mr. Bennett required Ford to read between the lines.

Plaintiff testified that, prior to filing her lawsuit in 1999, she told only three co-workers and two first-line supervisors about Mr. Bennett's alleged exposure or other purported sexual behavior. The first-line supervisors were the lowest level of supervision in the Wixom Plant and were below Mr. Bennett in the chain of command. Plaintiff presented no evidence that these supervisors had any input or decision making authority into hiring, firing, or other personnel actions relating to Mr. Bennett. Moreover, Plaintiff testified that she told these low-level supervisors as friends and made them promise they would keep the information confidential. She explicitly did not want them to share the information with Labor Relations or anyone else. (Apx. 124a-125a). Moreover, despite the many complaints and grievances Plaintiff filed against Mr. Bennett, Plaintiff admitted she had not once complained of sexual harassment of any sort. (Apx. 115b). Even accepting Plaintiff's testimony at face value, Plaintiff failed to provide Ford with the reasonable notice necessary to invoke *respondeat superior*, an essential *prima facie* element of her hostile environment claim.

Under Michigan law, it was Plaintiff's burden to prove each of the following elements in order to maintain her hostile environment case against Ford:

(1) [she] belonged to a protected group;
(2) [she] was subjected to communication or conduct on the basis of sex;
(3) [she] was subjected to unwelcome sexual conduct or communication;
(4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with [her] employment or created an intimidating, hostile or offensive work environment; and
(5) respondeat superior

Chambers v Trettco, 463 Mich at 311 (quoting Radtke v Everett, 442 Mich at 382-383). To establish the fifth element, *respondeat superior*, Plaintiff had to prove "some fault" on Ford's part by proving (1) she provided Ford with "reasonable notice," and (2) despite this reasonable notice, Ford failed to take prompt remedial action. Chambers, 463 Mich at 312-313 (emphasis by the Court). Because Plaintiff did not give Ford reasonable notice, Ford was denied its right to promptly investigate and take remedial action as warranted by the circumstances.

As discussed in Section II.B.2., Plaintiff could have raised a jury-submissible question on notice in one of two ways: by proving (1) actual notice; or (2) constructive notice. Sheridan v Forest Hill Public School, 247 Mich App at 621. To show actual notice, Plaintiff had to "show that she complained to higher management of the harassment." Id (emphasis added). To demonstrate constructive notice, Plaintiff had to show the harassment was so pervasive that Ford's knowledge that the her work environment was sexually hostile should have been inferred. Id.

1. Plaintiff Did Not Provide Actual Notice Because She Admittedly Told No One In Upper Management.

At trial, Plaintiff presented no proof of actual notice. As Plaintiff admitted, the only individuals she told about the alleged sexual misconduct by Mr. Bennett were three hourly co-workers and two first-line supervisors, Butch Vaubel and Gary Zuboch, both of

whom were below Mr. Bennett in the chain of command. (Apx. 184b-185b).[20] None of these individuals constituted "higher management" as a matter of law. Sheridan, 247 Mich App at 622 ("higher management" is limited to "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee") (emphasis added).

Moreover, even in supposedly telling Messrs. Vaubel and Zuboch, Plaintiff testified she told them as "friends" and insisted that they both promise to keep it confidential. (Apx. 124a-125a). An employee who has confided to her friends about sexual harassment, even if the friends are also supervisors, and has asked those friends to keep her complaint confidential, has not provided notice to the company for purposes of imposing *respondeat superior* liability. In Chambers v Wal-Mart Stores Inc, 70 F Supp 2d 1311 (ND Ga, 1998), aff'd, 193 F3d 523 (CA 11, 1999) (Table), after the plaintiff's supervisor lured her to his hotel room under false pretenses and attempted to kiss her, the plaintiff confided in a friend, who also was her store manager. The plaintiff implored the store manager to keep their conversation confidential. 70 F Supp 2d at 1316. This conversation, held the court, was not notice to the company:

> For vicarious liability purposes, notice to a manager does not constitute notice to management when the complainant asks the manager, as a friend, albeit a member of management, to keep the information confidential.

70 F Supp 2d at 1320. See also Hooker v Wentz, 77 F Supp 2d 753, 757-758 (SD W Va, 1999) (where plaintiff confided in her immediate supervisor about sexual advances but asked that he not report it to others, there was no notice to the employer); Sheridan,

[20] Mr. Vaubel denied Plaintiff told him of any sexual conduct until 1999, shortly before she filed this lawsuit. (Apx. 184b). Plaintiff did not call Mr. Zuboch at trial.

247 Mich App at 626 (where plaintiff admitted she did not want her team leader to tell anyone, "it is unreasonable to conclude that plaintiff reported the incident to [him] as encouraged under the policy for the purpose of stopping such harassment").

Plaintiff's argument that she gave actual notice by the mere act of confiding in Messrs. Vaubel and Zuboch, despite making them promise to keep a confidence, must be rejected. Plaintiff's position is that this was notice as a matter of law because it was all she was required to do under Ford's policy. Sheridan expressly rejected this argument, and rightfully so. Simply put, an employee who confides in a supervisor but insists the supervisor keep her allegations in confidence is not "providing notice" within the meaning of any policy. 247 Mich App at 625-626. Plaintiff clearly did not do all she was required to do under Ford's policy. If Plaintiff confided in Messrs. Vaubel and Zuboch on the condition of confidentiality as she testified, she was actually circumventing the policy (which required not only her report but her cooperation in an investigation of the complaint). (Apx. 323a). This Court should not favor efforts by employees to frustrate employer complaint procedures put in place for the purpose of encouraging compliance with Elliott-Larsen and similar laws.

2. Plaintiff Also Did Not Prove Constructive Notice.

As set forth in Section II.B.2., Plaintiff also did not sustain her burden of proving constructive notice as a matter of law. Plaintiff admitted unequivocally that she is certain no one in the entire Wixom Plant ever witnessed Mr. Bennett behave in a sexually inappropriate manner towards her. (Apx. 107b-108b). Therefore, Plaintiff relies solely on Mr. Bennett's misdemeanor conviction for off-premises off-duty conduct involving strangers, in combination with her complaints that Mr. Bennett allegedly (1) questioned her work restrictions when she tried to use them as an excuse to avoid a shift bump; (2)

denied her overtime; (3) resented her because, in 1995, she would not conspire with Ms. Holcomb to file false charges against another superintendent; and (4) colluded with Ms. Holcomb to give her "mean" looks. Despite all of these complaints and all of her conversations with Labor Relations about Mr. Bennett, Plaintiff never, not once, claimed that her problems with him had anything to do with sexual harassment. (Apx. 115b).

E. The Trial Court Did Not Abuse Its Discretion In Excluding Evidence Of Other "Sexual Harassment Complaints."

Plaintiff would have this Court believe that the issue of excluding unrelated complaints was an "eleventh hour" ploy by Defendants to which the trial court gave cursory attention before ruling in Defendants' favor. To the contrary, the trial court entertained extensive argument on the issue on at least four occasions, the earliest being in January 2001, some seven months prior to trial. It was also an issue on which the trial court repeatedly ruled that Plaintiff could introduce any evidence Plaintiff could connect to her work environment and/or to Mr. Bennett's alleged workplace conduct. Indeed, Plaintiff introduced evidence at trial regarding many of the alleged "complaints" in her "data base."[21] It was only those complaints that clearly were not part of Plaintiff's work environment that were ultimately excluded. The trial court's evidentiary ruling in this regard is reviewed only for an abuse of discretion. People v Brownridge, 459 Mich 456, 460; 591 NW 2d 26 (1999).

Plaintiff argues that Chambers compelled admission of her entire data base of complaints because "Chambers requires consideration of the totality of the

[21] Plaintiff did not make an offer of proof as to the "data base", nor was it "evidence" of anything. The data base was essentially her attorney's work product. Ford therefore objected in the Court of Appeals and objects here to Plaintiff attaching it to her brief or using it as a basis for appeal. What Plaintiff did do at the trial court level was identify selected complaints that she wanted to introduce and the trial court dealt with each of those on an individual basis, as discussed herein.

circumstances." (Plaintiff's Brief, p 47). The "totality of the circumstances" was not, as Plaintiff would have this Court believe, every allegation by a female anywhere within the 3500-employee Wixom Plant over a period of ten-plus years.[22] Rather, the totality of the circumstances was limited to that to which Plaintiff was exposed in her work environment, not what she or someone else may have heard later on, particularly through her litigation.

In Radtke v Everett, *supra*, this Court confirmed that it is the plaintiff's working environment that is to be considered under the totality of the circumstances:

> A hostile work environment claim is actionable only when, in the totality of circumstances, the work environment is so tainted by harassment that a reasonable person would have understood that the defendant's conduct or communication had either the purpose or effect of substantially interfering with the plaintiff's employment, or subjecting the plaintiff to an intimidating, hostile, or offensive work environment.

442 Mich at 398 (emphasis added). Similarly, in Langlois v McDonald's Restaurants of Michigan Inc, 149 Mich App 309, 317; 385 NW2d 778 (1986), the Court of Appeals held that the allegations of others were not evidence of the plaintiff's work environment. There, the plaintiff had argued that the employee who allegedly had harassed her had earlier harassed two of her co-workers, allegations she did not learn of until well after

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[22] Plaintiff's data base enumerated 72 alleged complaints over a period of 11 years, averaging approximately 6 to 7 allegations each year. While Ford would like to see the number of allegations reduced to zero, it must be remembered that the Wixom Plant had 3500 employees (Apx. 176b), and was, at least at that time, the largest manufacturing facility in North America. Moreover, many of the "complaints" Plaintiff identified in her data base did not allege any sexual conduct and apparently were included by Plaintiff simply because they were complaints by women. In addition, Plaintiff made no attempt to compare the number of complaints alleging sexual misconduct to the number of other categories of complaints, rendering meaningless her criticism that one of Ford's Labor Relations representatives was permitted to testify that the volume of sexual harassment complaints was relatively low in comparison to other types of complaints at the Wixom Plant.

the fact:

> We would have no difficulty accepting plaintiff's argument if either of the above described events had an effect on plaintiff's "psychological well being" as it pertained to the work environment. However, plaintiff admitted that she did not become aware of these incidents until after her own run-in with [the alleged harasser] and after [the alleged harasser] had been fired by the defendant for his actions. Further, when asked whether she was aware of any other incidents, she replied, "Not that I can recollect. I've heard around, through." We conclude the plaintiff cannot rely on incidents of sexual harassment of which she was unaware to establish she was subjected to a hostile environment for purposes of the Elliott-Larsen Civil Rights Act.

Id. See also Abeita v Transamerica Mailings Inc, 159 F3d 246, 249 n4 (CA 6, 1998) (evidence regarding alleged sexual harassment of others that plaintiff did not know of at the time is not relevant to whether she experienced a hostile work environment). Accord, Burnett v Tyco Corp, 203 F3d 980, 981 (CA 6, 2000). Indeed, to admit evidence of the complaints of others that cannot be tied to a plaintiff's own claim can be reversible error. Schrand v Federal Pacific Elec, 851 F2d at 156-157.

Consistent with this line of cases, Defendants objected under MRE 402 and 403 to any testimony regarding claims that could not be connected to Plaintiff or Mr. Bennett. The trial court carefully considered the issue of precisely what is encompassed within the "totality of the circumstances." The court invited extensive argument on this issue in January 2001.[23] (Apx. 1b-17b). When Ford subsequently filed a motion *in limine* to exclude complaints that were unrelated to Plaintiff or Mr. Bennett, the court again heard extensive argument on the issue. The court took Ford's Motion under advisement. (Apx. 30b-45b). The trial court revisited the issue the following day, at which time the court granted the motion in part and denied it in part.

[23] The court reporter in the trial court mislabeled the hearing date as January 19, 2000.

Specifically, the court advised Plaintiff she could introduce any such evidence that she could demonstrate was relevant to her work environment, including allegations by others concerning Mr. Bennett or any one else who Plaintiff claimed had acted in a sexually inappropriate manner toward her. (Apx. 46b-53b). The trial court again heard extensive argument in the midst of trial, confirming again that Plaintiff could introduce evidence that she could connect to either her own work environment or to Mr. Bennett. (Apx. 121b-144b). As a result, much of the evidence represented in Plaintiff's "data base" was introduced. (See eg, Apx. 148a-200a, 117b-120b, 192b-194b). In addition, Plaintiff was permitted to inquire into Ford's response to these complaints. (See eg, Apx. 161b-173b).

The trial court's thorough examination of the multitude of evidence of complaints by others, admitting much of it and excluding only the most attenuated evidence, was not an abuse of discretion. Such unrelated evidence could only distract and confuse the jury as to the material issue in the case, which was Plaintiff's environment -- not the environment of others in far-flung reaches of the Wixom Plant that Plaintiff never even visited.[24]

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[24] Plaintiff specifically took issue with the testimony of Ford's Personnel Relations Manager, Richard Gross, complaining Mr. Gross was permitted to testify that he was not aware that the Wixom Plant, in particular, had sexual harassment problems that "caused the alarms to go off." (Plaintiff's Brief, p 47). Mr. Gross's testimony related to a specific audit procedure, whereby 20 percent of the salaried workforce at a Ford facility was interviewed. Mr. Gross testified that this audit, when conducted at the Wixom Plant, did not identify sexual harassment as a particular problem. Plaintiff did not object during trial to any of Mr. Gross's testimony in this regard, meaning it is not properly before this Court. In fact, Plaintiff's counsel cross-examined Mr. Gross on the audit he described, and asked whether he had seen Plaintiff's counsel's "data base" or any summary that would enumerate sexual harassment complaints at the Wixom Plant. Mr. Gross confirmed that he had not seen documents of this nature. (Apx. 174b-175b).

III. RELIEF REQUESTED

Defendants-Appellees Ford Motor Company and Daniel P. Bennett respectfully request that this Court affirm in full the Court of Appeals' rulings in this matter, and affirm the principles enunciated by the Court of Appeals in Jager, that Elliott-Larsen's definition of "employer" applies to an employer's vicarious liability, and does not create individual liability.

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